No. 79-1213

# In the Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
*Petitioners,*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.,
*Respondents.*

On Writ of Certiorari to the California Court of Appeal, First Appellate District

## BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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## CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

## INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL is vitally interested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the ADL has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973); *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *Regents* v. *Bakke,* 438 U.S. 265 (1978); *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979); and *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (1980).

The ADL deplores the continued existence in this country of discrimination based upon race, religion and perceived national or ethnic origins. Not until discrimi-

nation is eliminated will the United States be a nation where all citizens in fact enjoy equal opportunities, as they should. Improperly drawn "affirmative action" plans, however, such as the plan here at issue, which are based upon the assignment of specific employment positions according to governmentally designated racial, ethnic and surname classifications, do not promote equal opportunity; rather, they foster arbitrary, divisive and discriminatory action by state government. Such a plan cannot be squared with the Constitution.

Just as ADL has in the past opposed discrimination based on race, religion or ethnic origin, so too is ADL opposed to any scheme of governmental preferences or benefits based upon the race, religious beliefs or ethnic origin of individuals. Such a scheme violates the most fundamental concept of equal protection by imposing a regime whereby the government prefers members of certain designated racial or ethnic groups over other citizens, even where the beneficiaries of the preference have not themselves been discriminated against. Such a scheme cannot pass the constitutional test of equal protection, the decisions of this Court in *Weber* and *Fullilove* notwithstanding. ADL respectfully submits that the racial discrimination permitted in these cases is not a blank check for government to sponsor racial preferences in all circumstances and that this case clearly is beyond the line of preferences previously permitted by the Court.

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Statement of the Case | 1 |
| Summary of Argument | 7 |
| Argument | 9 |
| I. The Purported Administrative Goal Of Promoting Safety And Efficiency In A Prison System Is Not A Compelling State Interest Which Justifies The Promotion Of Correctional Officers According To Their Race and Surnames | 9 |
| II. The Affirmative Action Plan Of The California Department Of Corrections Does Not Pass The Scrutiny Required By Equal Protection Because There Are Less Drastic Means To Manage Prisons Efficiently Than By Depriving Correctional Officers Of Employment Rights | 15 |
| III. None Of The Petitioners Has Standing To Challenge The Constitutionality Of The Affirmative Action Plan Of The California Department Of Corrections | 21 |
| Conclusion | 26 |

# TABLE OF AUTHORITIES

## *Cases*

PAGE

Baker v. Carr, 369 U.S. 186 (1961) ..... 21

Bartemeyer v. Iowa, 85 U.S. (Wall.) 129 (1873) ..... 22

Brown v. Board of Education, 347 U.S. 483 (1954) ..... 10

Buchanan v. Warley, 245 U.S. 60 (1917) ..... 12

California v. La Rue, 409 U.S. 109 (1972) ..... 22

Coleman v. Miller, 307 U.S. 433 (1939) ..... 22

Data Processing Service v. Camp, 397 U.S. 150 (1970) 24

Doremus v. Board of Education, 342 U.S. 429 (1952) .... 22

Dunn v. Blumstein, 405 U.S. 330 (1972)) ..... 16

Fullilove v. Klutznick, 48 U.S.L.W. 4979 (1980) .....13, 16

In re Griffiths, 413 U.S. 717 (1973) ..... 9

Lee v. Washington, 390 U.S. 333 (1968), *aff'g* 263 F. Supp. 327 (M.D. Ala. 1966) .....10, 11

Loving v. Virginia, 388 U.S. 1 (1967) ..... 9

McLaughlin v. Florida, 379 U.S. 184 (1964) ..... 9

NAACP v. Button, 371 U.S. 415 (1963) ..... 24

O'Shea v. Littleton, 414 U.S. 488 (1974) .....22, 23

Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948) ..12, 19

Regents v. Bakke, 438 U.S. 265 (1978) .....13, 14, 20

San Antonio Independent District v. Rodriguez, 411 U.S. 1 (1973) .....15, 16

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) ..... 22

PAGE

Sierra Club v. Morton, 405 U.S. 727 (1972) ..... 24, 25

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) ..... 23, 24

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) .. 25

United States v. Wyandotte County, Kansas, 480 F. 2d 969 (10th Cir. 1973), *cert. denied,* 414 U.S. 1068 (1973) ..... 11

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) ..... 13, 14

Warth v. Selden, 422 U.S. 490 (1975) ..... 25

Watson v. Memphis, 373 U.S. 526 (1963) ..... 12

*Statutes*

Alabama Code tit. 1, § 2 (1940) ..... 20

Texas Penal Code Art. 493 (1947) ..... 20

*Miscellaneous*

Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations,* 71 Yale L.J. 1387 (1962) ..... 19

Mangum, The Legal Status of the Negro (1940) ..... 20

Murray, States' Laws on Race and Color (1950 and 1955 supp.) ..... 20

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**On Writ of Certiorari to the California Court of Appeal, First Appellate District**

## BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

### STATEMENT OF THE CASE

In 1974 the California Department of Corrections (hereinafter "Department") adopted an Affirmative Action Plan (hereinafter "AAP"), a principal objective of which

is "increasing the number of 'minority' employees to a level equalling at least 70% of any 'minority' in the inmate population of the Department (i.e., State prisoners)." *Minnick* v. *California Department of Corrections,* 95 Cal. App. 3d 506, 514, 157 Cal. Rptr. 260, 264 (1979).*

The AAP requires increases in the employment of the following minorities by various segments of the Department: "Black," "Asian," "Spanish surname," "Native American," and "other extraction." The AAP set a goal of "36% minorities employed" by July, 1979, *Minnick, supra,* 157 Cal. Rptr. at 264;** the AAP itself, however, contains no expiration date, Exhibit R. The AAP is to be applied in all areas involving the promotion, transfer, training and work assignments of the Department's personnel. *Minnick, supra,* 157 Cal. Rptr. at 264.

The AAP's purpose is to serve "inmate-related objectives of the Department by improving relationships with prisoners and reducing severe racial conflict and violence within the State prison system." *Id.* at 264. The Department believed "that race . . . may be one pertinent factor, among others, affecting the ability of an individual to communicate with and relate to members of a par-

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* This brief does not address any questions raised by the AAP's other principal objective, increasing the number of female employees in the Department to a percentage equivalent to that in California's labor force.

** By contrast, the "special admissions" program to the medical school at the University of California at Davis was 16% of the entering class, *Regents* v. *Bakke,* 438 U.S. 265, 275 (1978); the federal public works set-aside for Minority Business Enterprises was 10%, *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979, 4980 (1980).

ticular race. . . ." Respondents' Brief in Opposition to Writ of Certiorari, p.13.*

When the preferences of the AAP were applied, a person's status as a "minority" was considered at least a "plus" factor in the decision to promote or transfer an employee. This "plus" was sometimes decisive in the promotion or transfer of a less qualified candidate from an officially preferred minority group over a more qualified candidate from a group which the Department did not choose to recognize as one which should be favored in its AAP. It is not clear how widely the preferential policies of the AAP were pursued within each unit of the Department. *Minnick, supra,* 157 Cal. Rptr. at 264.

During the administration of the AAP, vacancies in certain positions were sometimes left open, and promotions or transfers to them were sometimes delayed, until qualified employees from preferred groups could be found to fill them. Some of these positions were labelled as "only" for members of designated preferred groups. *Id.* For example, positions were advertised as "Corr[ectional] Sergeant-Minority," Exhibit 11, and "Correctional Lt.-Minority," Exhibit 13.

Even when positions were not reserved by title to members of certain groups, the Department's officials expressed an intention to fill positions with members of

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* For example, defendants' expert witness, Dr. David Lopez-Lee, testified "that the odds are better than chance that a black person will relate better to a black person than he will to a white person and vice versa." RT 853. Dr. Lee, however, also noted that "It's not to say that you'll not have black persons that relate better to whites and vice versa," RT 853, and he admitted "that people can relate to one another . . . based on . . . a whole host of variables, only one of which is race," RT 856.

(Citations to the record herein are to the Reporter's Transcript ("RT"), the Clerk's Transcript ("CT") and to particular exhibits.)

preferred groups. RT 39; RT 55-56. These officials told employees that, because of their race, they need not apply for certain positions. RT 69-70, 150-51.

There is no procedure to resolve disputes about the classification of particular persons. The Department has no scientific or other objective basis by which to classify employees and inmates into the categories for granting preferences under the AAP. *Id.* at 226, n.5. See also RT 700 (fourth-generation Mexican named "Cohen" would not qualify for any preference). No scientific means can apply the categories of the AAP to individuals.

Wayne Minnick and Henry J. Darden, who are both White, are correctional officers employed by the Department. They are also members of the California Correctional Officers Association (hereinafter "CCOA"), a recognized bargaining agent of correctional officers and other employees of the Department. Minnick applied for a position as a Correctional Program Supervisor II in May, 1975. He did not receive the promotion. He filed a grievance to which the Department responded in part:

> "We are required to implement the Departmental Affirmative Action program at all levels. We are attempting at this time to fill the CPS positions with a qualified minority or female."

RT 39.

Similarly, Darden applied for a position as a Program Supervisor III in February, 1975, and did not receive the promotion. He filed a grievance to which the Department responded in part:

> "We have not committed our CPS III position to anyone; however, we are actively canvassing to try to fill this position on a staff development basis with a minority staff member of CC I or P.A. I level. We have no CPS III minority staff at this facility and it

> is our intention to fill this position with a minority member. . . ."

RT 55.

Minnick and Darden filed grievances with the State Personnel Board without success. Later at trial, it was determined that neither Minnick nor Darden had been eligible for promotion under civil service rules which applied apart from the AAP. *Id.* at 264.

CCOA bases its standing to bring this action on the following allegation:

> "Plaintiff CCOA is damaged by the employment practices described herein in that it actively seeks, on behalf of its members and all correctional officers employed by the STATE OF CALIFORNIA, to have each person judged on the basis of his or her abilities, and not on the basis of race, color, national origin, or sex. The sort of employment practices engaged in, on information and belief, by defendants in fact divide one correctional officer from another, and do in fact, on information and belief, increase racism and sexism in our society. As an organization actively opposed to racism and sexism, and working actively to increase the unity of all correctional officers, plaintiff CCOA has no plain, speedy or adequate remedy at law to rectify the unlawful employment practices described herein other than by the relief prayed for in this Complaint."

First Amended Complaint, p.11. CCOA has offered no evidence that it suffered any financial or other concrete injury as a result of the AAP.

The trial court denied plaintiffs' motion for certification as a class action because Minnick and Darden had not shown that they had been denied promotion because of allegedly discriminatory personnel practices. The court, however, accepted a stipulation that plaintiffs had

standing to obtain relief apart from money damages. *Id.* at 265.

In response to an interrogatory, the Department denied that it had "willfully, with a specific intent, engaged in illegal and/or improper discrimination against any person with regard to employment opportunities . . . on the basis of a person's race, color, creed, sex or national origin." *Id.* The trial court denied respondents' motion for an order augmenting the record to include evidence to show that the AAP had been designed in part to rectify past practices which had operated to discriminate on racial and other grounds. *Id.** As the record stands there is no evidence of past discriminatory practices by the Department. The court instead looked to such interests as promoting safety in prisons and minimizing racial tensions as the purported justification for the AAP. *Id.* at 266 n.5. It declared that the AAP violated, *inter alia,* the Fourteenth Amendment to the United States Constitution. *Id.*

The court of appeal affirmed the trial court's denial of the motion to augment the record to include evidence of past discrimination, characterizing the motion as an "afterthought." *Id.* at 272. It reversed the trial court's order granting declaratory and injunctive relief, holding that the AAP did not provide for "functional quotas" which would violate the Equal Protection Clause or the California Constitution. *Id.* at 269-70.

The petition for writ of certiorari was granted by this Court on July 2, 1980. 48 U.S.L.W. at 3855.

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* The Department's proffered evidence of past discrimination relied primarily on "institutional" or "societal" racism. *E.g.,* Exhibit Q, p.4:

> Over the years the Department has actively practiced racism—often times without realizing it, and in about the same degree as racism exists in society.

## SUMMARY OF ARGUMENT

The decision of the California Court of Appeal, which upholds employment preferences based upon racial and surname criteria, violates the fundamental principle of our democracy that all persons are entitled to equal protection of the law. The purported purpose of the Affirmative Action Plan ("AAP") is to increase the efficiency of prison management by lessening racial tensions; the AAP is not designed to eradicate the present effects of part discrimination. A classification based upon such a purpose is inherently suspect and calls for the most exacting judicial examination.

The AAP is not based upon the action of any legislative body, let alone the United States Congress. This plan is not entitled to the deference which this Court accorded the public works set-aside for minority businesses in *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (1980).

The objectives of the AAP are not compelling. Never has this Court approved a racial preference which is designed to help make government more efficient. The assumption that racial preferences can ever lessen racial tensions is wrong, and, in any event, this Court has never shirked from its duty to enforce the Equal Protection Clause for fear of provoking racial hostilities. This Court's decisions in *Regents* v. *Bakke,* 438 U.S. 265 (1978), *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) and *Fullilove, supra,* which gave limited approval to racial preferences, do not authorize the discriminatory policies of the AAP.

The AAP also fails strict scrutiny because it is not precisely tailored to serve its objectives. Its assumption that persons of certain groups communicate and "relate" best with their own kind, (which some of Respondents'

own evidence tends to disprove) is an irrebutable employment policy which overlooks the talents and abilities of particular individuals. Far from lessening racial tension, the AAP widens the divisions between groups.

The AAP, unlike the provision approved in *Fullilove,* has no procedure for resolving disputes about its application to individuals and no provision for exemption in particular cases. It bears the burden of any plan which categorizes persons according to racial categories: government becomes involved in the dirty business of subjecting the racial identity of individuals to scrutiny, and the results are likely to be arbitrary and inconsistent.

Although we believe this Court should address the merits, we also feel obliged to note the jurisdictional problems posed by the lack of standing on the part of plaintiffs to present this case. The individual plaintiffs lack standing because civil service rules, which they have not challenged, rendered them ineligible for promotion apart from the operation of the AAP. Any possible future injury to them is merely speculative. The organizational plaintiff has not alleged an injury to itself, but only to its objectives. It cannot base standing upon any injury to its members because no such injury has been shown and the degree of possible injury—or benefit—to members would require individualized proof. Accordingly, in the alternative, we ask that this Court dismiss the writ of certiorari as improvidently granted.

## ARGUMENT

### I. The Purported Administrative Goal Of Promoting Safety And Efficiency In A Prison System Is Not A Compelling State Interest Which Justifies The Promotion Of Correctional Officers According To Their Race And Surnames.

The AAP is a racial preference in employment by the state. Its purported purpose is to increase the efficiency of prison management by lessening racial tensions; it is not a remedy for past racial discrimination. Surely the AAP creates an "inherently suspect" classification which "call[s] for the most exacting judicial examination," *Bakke, supra,* 438 U.S. at 291 (opinion of Powell, J.). Such a racial classification is constitutionally prohibited unless it is a necessary means of advancing a "compelling governmental interest." See *In re Griffiths,* 413 U.S. 717, 721-22 (1973); *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964).

The question before this Court is whether assertions of efficiency and the purported lessening of racial tension will be added to the short list of governmental objectives which have been held to justify the treatment of Americans according to their race. This case, even more than *Bakke, Weber* or *Fullilove,* represents a threat to principles of racial equality because the interests asserted here have consistently been rejected by this Court as a justification for discrimination.

Neither court below found or relied upon the present effects of past discrimination to support the AAP in any way. See p.6 *supra.* Instead, the rationale for this race-conscious AAP is as follows:

> The AAP indicated, and there was evidence, that the desired "minority" level would serve inmate-related objectives of the Department by improving rela-

> tionships with prisoners and reducing severe racial conflict and violence within the State prison system.

*Minnick, supra,* 157 Cal. Rptr. at 264. See also *id.* at 268:

> the trial court effectively determined that the practices apply to prison-related realities of race . . . to the point of promoting a "compelling state interest" in a safe and efficient correctional system.

Such considerations of prison management do not justify an exception to constitutional principles of racial equality. For example, in *Lee* v. *Washington,* 390 U.S. 333 (1968) (*per curiam*), *aff'g* 263 F. Supp. 327 (M.D. Ala. 1966) (per Johnson, J.), Alabama's argument that "routine prison security and discipline" required segregation of prisoners by race failed, because *Brown* v. *Board of Education,* 347 U.S. 483 (1954), foreclosed the segregation of any state facilities. Judge Johnson held, in an opinion which the Supreme Court described as "unexceptionable," 390 U.S. at 334:

> this Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities.

263 F. Supp. at 331. Three members of this Court noted:

> prison authorities have the right, acting in good faith and *in particularized circumstances,* to take into account racial tensions in maintaining security discipline and good order in prisons and jails.

*Id.* at 334 (concurring opinion of Black, Harlan and Stewart, JJ.) (emphasis added).* The lower courts quite prop-

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* Judge Johnson's sole example of an "isolated instance" which could require segregation for "a limited period" was the "tank" used in large cities, where intoxicated persons are kept until they become sober. 263 F. Supp. at 331 n.6.

erly have interpreted this statement narrowly to mean only that "there may arise unusual circumstances in which security and discipline demand segregation for limited periods," but not systematically, *United States* v. *Wyandotte County, Kansas,* 480 F.2d 969, 971 (10th Cir. 1973), *cert. denied,* 414 U.S. 1068 (1973) ("We cannot construe this caveat as authorizing the consistent and settled practice of 'Negroes to the East tank, whites to the West tank,' we have before us.")

No emergency justifies the racial preferences in the case at bar but rather a desire to lessen racial tension generally. Respondents cite no particularized circumstances to explain their plan, only the generalized rise of racial tensions in the 1960's and 70's and the supposed inability of persons to communicate and "relate" with persons from other groups. The AAP does not assign a Black guard to a particular cell block for a day or two during an emergency; it prefers a Black guard to his White colleagues in perpetuity in all areas of employment, including promotions, transfers, training and work assignments. This systematic attempt to combat problems by using a racial solution is the kind of unparticularized plan which three members of this Court expressly sought to prevent by warning that, in the context of prisons, the Court would countenance no "dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination," *Lee, supra,* 390 U.S. at 334.*

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* The degree to which this plan prefers members of certain groups is disputed, but whether the AAP operates as a strict quota or as a deciding "plus" with respect to certain individuals, it cannot pass constitutional muster because it does not serve compelling state interests. In any event, it is important to note that the plan would promote members from preferred groups until they equal fully 70% of the population of such groups among the inmates.

If the needs of prison security and discipline cannot justify violating the rights of the prisoners to desegregated facilities, then *a fortiori* they may not be allowed to violate the rights of the prison guards to equal employment opportunities. Prisoners do not lose all their constitutional rights when they enter prison; certainly the guards should not lose *any* rights.

Moreover, lessening racial tension or increasing governmental efficiency cannot be deemed to be the type of state interest which justifies racial discrimination; otherwise, there would have been no basis for desegregating prisons in the South or for integrating neighborhood schools in the North. Antimiscegenation statutes might still survive, because they were supported by the idea that racial discrimination diminishes the contacts and therefore the tensions between races, *e.g., Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P.2d 17, 26 (1948). This Court has never allowed such asserted interests to overcome the Constitution's clear commands:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.

*Buchanan* v. *Warley,* 245 U S. 60, 81 (1917) (striking down ordinance making it unlawful for colored person to occupy a house on a block where a majority of residents were Whites). See also *Watson* v. *Memphis,* 373 U.S. 526, 536 (1963) (fears by public officials of violence and inability to preserve peace not allowed to delay desegregation of schools).

Presumably, White prison guards are among the intended beneficiaries of the plan to lessen racial tensions in

prison. But Wayne Minnick and Henry J. Darden are willing to take their chances with the racial tensions of a prison system without the AAP in effect and to serve in a prison where persons of their own race are outnumbered. Their willingness to work in a difficult job is more in harmony with the principles underlying the Court's landmark racial equality decisions than is the California Department of Correction's imposition of racial preferences in employment as a supposed solution to racial tensions.

The goals of the AAP before the Court stand in contrast to those approved in *Fullilove* v. *Klutznick,* 48 U.S. L.W. 4979 (1980), *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979), and *Regents* v. *Bakke,* 438 U.S. 265 (1978).* In *Fullilove,* an essential feature of the minority set-aside was that it was a "remedial" plan, designed to prevent "procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination. . . ." 48 U.S.L.W. at 4986 (opinion of Burger, C.J.). See also *id.* at 4995 ("[e]nactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination") (opinion of Powell, J.); and *id.* at 4998 ("principles outlawing the irrelevant or pernicious use of race were inapposite to racial classification that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination.") (opinion of Marshall, J.). No remedial goal supports the plan in *Minnick,* nor is the plan based on any statutory authorization with accompanying findings of previous discrimination.

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* The citation of these three decisions does not imply that the Anti-Defamation League of B'nai B'rith believes that they were correctly decided. The principles which those cases recognized, however, do not support the decision below.

In *Weber,* although there was no state action, the Court carefully noted that the affirmative action plan was "a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance," 443 U.S. at 208. The goal of the plan was "to break down old patterns of racial segregation and hierarchy." *Id.* The AAP in *Minnick* turns *Weber's* plan on its head. It is not designed to eliminate a manifest racial imbalance between the work force and the general population, because there is none on this record. Its purpose is to achieve and maintain a racial balance between correctional officers and the inmate population. It does not break down old patterns of racism, but yields to racism by creating a new racial hierarchy.

The management of a prison system lacks the favored constitutional status of "the attainment of a diverse student body," the goal which Mr. Justice Powell regarded as "compelling" in *Bakke.* His opinion describes the way that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment," 438 U.S. at 311-12. There are no similar considerations involved in the management of prisons.

Moreover, the justification invoked by respondents here will be difficult to cabin. Affirmance would allow prisons and jails all over the country where racial tensions exist to discriminate against some of their correctional officers. Public schools, which also experience violence and problems of communication, could choose to promote teachers from favored racial groups instead of their better qualified colleagues.

Furthermore, if the facts were reversed and there were more Whites among prisoners than there were among the guards, an identical rationalization would be available for favoring White correctional officers at the expense of

Blacks. Indeed, if racial tensions existed in any governmental setting in which Whites predominated, officials could set a goal for preferring Whites in a supposed effort to combat problems of communication between groups. Thus, racial preferences such as the AAP can be turned against the groups in our society who have suffered from racial discrimination in the past.

We all recognize that prison management is difficult, that racial tensions exist, and that violence erupts. But the Constitution will not permit such problems to be the basis for depriving innocent persons of their right to racial equality. Affirmance of the appellate court's decision would signal a retreat from threats of racial violence and be a victory for bigotry.

## II. The AAP Does Not Pass The Scrutiny Required By Equal Protection Because There Are Less Drastic Means To Manage Prisons Efficiently Than By Depriving Correctional Officers Of Their Employment Rights.

The AAP places the burden of racial hostilities in prisons entirely upon correctional officers from disfavored racial groups. No scientific or objective basis exists by which to classify people into one category or another. There is no procedure for resolving disputes about categorizing individuals.

In this case, strict scrutiny is the proper standard of review. Classifications which deny a benefit to any individual because of race or ethnic background "are inherently suspect and thus call for the most exacting judicial examination." *Bakke, supra,* 438 U.S. at 291 (opinion of Powell, J.). Even when strict judicial scrutiny is not required, under *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 17 (1973), a provision "must still be examined

to determine whether it rationally furthers some legitimate, articulated state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.'"*

The AAP cannot satisfy the command of the Equal Protection Clause that all provisions "affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives," *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). It imposes disabilities upon the members of disfavored racial groups indefinitely.**

The plan rests upon broad and unwarranted assumptions about the ability of people from different groups to communicate with each other. See p.3 *supra*. It does not take into account the fact, which plaintiffs' expert witness

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* Four members of this Court have applied a less strict test for scrutinizing racial classifications in which the majority racial group disadvantages itself so as to benefit a "discrete and insular minority" which lacks political power. *Bakke, supra*, 438 U.S. at 362 (opinion of Brennan, J.). This test is grounded on the need to bring historically disadvantaged racial groups into the mainstream of society. See *id.* at 396 (opinion of Marshall, J.) ("bringing the Negro into the mainstream of American life should be a State interest of the highest order"). The rationale for this test does not apply where, as here, the benefit for the racial minority has nothing to do with the eradication of the present effects of past discrimination. The AAP's assumption is that people from *all* groups communicate better with their own kind. This assumption would justify favored treatment for White correctional officers if the facts were reversed. This classification, therefore, does not merit the looser scrutiny which the test articulated by Mr. Justice Brennan applies.

** The relatively short duration of the minority set-aside in *Fullilove* was referred to by two opinions upholding the provision, 48 U.S.L.W. at 4990-91 (Burger, C.J.), and *id.* at 4997 (Powell, J.)

admitted, that there are "black persons that relate better to blacks and vice versa." *Id.*

Less drastic plans to achieve the goals of the AAP would give due deference to the varied gifts of individuals without discriminating; for example, by promoting correctional officers who demonstrate an ability to communicate with persons outside of their own racial groups, training correctional officers in communications, deploying guards with the best ability to communicate during emergencies, or even increasing the mobility and visibility of guards who are members of minority groups.

There are no congressional findings of past discrimination to support the AAP as there had been in *Fullilove, supra.* There are no findings even by the California legislature. But the AAP would not survive equal protection analysis even if it had been adopted by Congress itself because its administration offers no safeguards to assure that it is narrowly tailored to the achievement of its goal, *Fullilove, supra,* 48 U.S.L.W. at 4988 (plurality opinion, per Burger, C.J.). Among the safeguards which the Court deemed significant in *Fullilove* was an administrative mechanism, including a complaint procedure, to ensure that only bona fide Minority Business Enterprises are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination. 48 U.S.L.W. at 4990. By contrast, the assumptions underlying the AAP may not be rebutted in the administrative process as they were in *Fullilove.* Nor are there procedures for waiver and exemption.

Moreover, the record in this case is devoid of any procedure, administrative or otherwise, for applying fairly

the AAP's undefined criteria to individuals. In *Fullilove,* at least, the plurality noted that "[a]dministrative definition has tightened some less definite aspects of the statutory identification of the minority groups. . . ." 48 U.S. L.W. at 4990. But the trial court in *Minnick* found that:

> Defendants have no scientific or objective basis whatsoever by which they classify people into one racial category or another, for purposes of granting preferences or imposing detriments concerning job opportunities with defendants. Defendants have no dispute-resolution procedure by which a person seeking to be placed in one category, instead of another, can complain, or by which a person complaining of the categorization of another person may complain.

157 Cal. Rep. at 266 n.5. The indication that the plan merely represents an "'optimum' quota", which for unexplained reasons has not yet been attained, *id.* at 268, certainly offers no assurance that the AAP can ever be applied fairly to individuals.*

The appellate court understated the problem of administration when it observed, "the identification of race by surname is somewhat casual and very possibly inaccurate, (e.g., in identifying the race of a woman married to a husband with an Asian surname)." *Id.* at 271. Presumably, a person of Spanish extraction whose parents were born in the United States would qualify for the prefer-

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* *Fullilove* requires that, even in a facial challenge, a racial classification "cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that it will be limited to accomplishing [its] objectives and that misapplications of the program will be promptly and that misapplications of the program will be adequately remedied administratively." 48 U.S.L.W. at 4989-90 (opinion of Burger, C.J.). There is no such assurance here.

ence, while a child born to a Mexican mother and a father without a Spanish surname would not. The term "Asian" may broadly refer to anyone originating in the world's largest continent, or it may denote a smaller number of particular groups; *e.g.*, those originating in Southeast Asia or China or Japan. In addition to such anomalies, there are the perplexities inherent in any attempt to define the race of an individual. Science has not evolved a precise definition of race or ethnicity, much less precise definitions, which can classify individuals. See Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations,* 71 Yale L.J. 1387, 1421 (1962) (collecting citations).

The ugly task of racial categorization is complicated by the need to synchronize the racial composition of two groups, inmates and correctional officers. Unlike the minority set-aside at issue in *Fullilove,* this means that persons are entitled to a governmental benefit not only by claiming it themselves as a member of a favored group but by subjecting the racial identity of the inmate population to scrutiny. The employment rights of correctional officers could hinge on periodic counts of the racial identities and surnames of those newly incarcerated in and newly discharged from the prison, yet the AAP has no objective basis for classifying individuals and no procedure for resolving disputes about particular classifications.

The courts in California will not supply the precision in applying these racial preferences that the Equal Protection Clause requires. The Supreme Court of California has held that racial terms such as those used in the AAP are invalid because they are too vague and uncertain. In *Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P.2d 17, 27-29 (1946) (en banc) (per Traynor, J.) the court held that an anti-miscegenation statute was void on its face because, *inter*

*alia,* the terms "white persons", "Negroes, Mongolians, members of the Malay race or Mulattoes" could not reasonably be applied:

> "If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one."

198 P.2d at 29. With no basis for applying the AAP fairly to individuals, the AAP is inherently arbitrary.

Allowing a state agency to classify individuals according to race is particularly dangerous. See *Regents* v. *Bakke,* 438 U.S. 265, 309 (1978) (opinion of Powell, J.) ("isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria."). This plan harks back to a time when segments of state governments made distinctions based upon race which not only were arbitrary,* but also conflicted.**

The AAP offers a blunt instrument when the Constitution requires precision. While purporting to alleviate racial tension, it visits the consequences of racial prejudice on innocent groups. It irrationally varies the employment rights of prison staff according to the racial

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* See, *e.g.,* Mangum, The Legal Status of the Negro 1-17 (1940); Murray, States' Laws on Race and Color (1950 and 1955 supp.) (see "Negro, definition of" under state name in index).

** Compare Ala. Code tit. 1, § 2 (1940) ("Negro" includes a person of mixed blood descended on the part of the father or mother from Negro ancestors, without reference to or limit of time or number of generations), with Tex. Penal Code Art. 493 (1947) ("Negro" includes a person of mixed blood descended from Negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a White person).

composition of prisoners. No legislative action, no findings of fact justify the plan. There are no safeguards of enforcement and no expiration date. Moreover, the AAP involves a segment of state government in the business of classifying individuals into arbitrary categories. This provision was not drawn with precision or tailored to serve legitimate objectives.

The judgment below should be reversed because it condones the use of a patently unconstitutional means to an invalid end. The AAP creates a preferred employment status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin. The AAP is a divider of society in a nation striving for an equality that will make race irrelevant, politically, economically, and socially.

## III. None Of The Petitioners Has Standing To Challenge The Constitutionality Of The Affirmative Action Plan Of The California Department of Corrections.

Although we contend that, if this Court reaches the merits, the judgment of the court of appeal should be reversed, we are bound to note that the pleadings and record in this case reveal that none of the petitioners has standing to challenge the constitutionality of the AAP. None has been injured: Minnick and Darden were not eligible for positions they sought, wholly apart from the AAP. CCOA has shown no injury other than that allegedly suffered by Minnick and Darden. Thus, the petitioners have not alleged or shown "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," *Baker* v. *Carr,* 369 U.S. 186, 204 (1961). In the absence of this concrete adverseness, this

Court should dismiss the petition for certiorari as improvidently granted.

This Court is not bound by the California courts' implicit determination that this case is within the jurisdiction of the courts. To the contrary, as Justice Frankfurter wrote,

> To whom and for what causes the courts of [a state] are open are matters for [that state] to determine. But [that state] cannot define the contours of the authority of the federal courts, and more particularly of this Court. It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances.

*Coleman* v. *Miller,* 307 U.S. 433, 462 (1939) (concurring opinion). See also *Doremus* v. *Board of Education,* 342 U.S. 429, 434 (1952) (Supreme Court not bound by state court's acceptance of jurisdiction, concluding that the record did not establish plaintiffs' standing).

The review required by Article III of the Constitution reveals that there is no basis for standing here. The trial court's acceptance of a stipulation by the parties is not a ground for standing. See, *e.g., Bartemeyer* v. *Iowa,* 85 U.S. (18 Wall.) 129, 135 (1873) (failure to deny jurisdictional allegation did not confer jurisdiction); *California* v. *La Rue,* 409 U.S. 109, 113 n.3 (1972) ("parties may not confer jurisdiction . . . upon this Court . . . by stipulation").

If a party is to satisfy minimum standing requirements, he must allege that he has suffered or will suffer some concrete "injury in fact," *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 218 (1974) (no standing as citizens or taxpayers to challenge membership of congressmen in armed forces reserves), or that he " 'is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct,"

*O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974) (no standing to challenge allegedly discriminatory judicial practices by those not injured).

Plaintiffs Minnick and Darden cannot satisfy these tests for "injury in fact," because the evidence established that neither plaintiff "had been eligible for promotion under conventional civil service rules which applied irrespective of the AAP or its implementation." *Minnick, supra,* 157 Cal. Rptr. at 264. Therefore, this Court cannot find, as it must under Article III, that "plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision," *Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 38 (1976).

Petitioners' assertions of injury in the future from the implementation of the AAP also fail to meet the minimum standing requirements of Article III. The threatened injury is "conjectural" or "hypothetical" rather than "real" and "immediate," *O'Shea* v. *Littleton, supra,* 414 U.S. at 494. Minnick and Darden's allegations of future injury follow a wholly speculative chain of reasoning: *If* the individuals continue their employment with the Department of Corrections and *if* they ever become qualified for promotion under unchallenged civil service rules and *if* they seek promotion and *if* the AAP remains in force and *if* they are denied promotion on the basis of race as a result of the AAP, they will suffer injury in fact. Certainly, to accept this line of reasoning would require the Court to engage in speculation that is insufficient to establish standing.

CCOA, the organizational plaintiff, also fails the test of "injury in fact." At trial below, CCOA alleged that it had been " 'damaged' by the described employment practices because they frustrated its objectives as 'an organization actively opposed to racism and sexism, and working actively to increase the unity of all correc-

tional officers . . . .' " *Minnick, supra,* 157 Cal. Rptr. at 263. This allegation, and the evidence adduced, are insufficient to confer standing, because there is no injury to the organization itself, merely to a generalized concern. In *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), an environmental group, which had a long-standing interest in conservation, sought to challenge actions by the Department of the Interior that would have transformed a "quasi-wilderness" area into a ski resort. The Sierra Club, in a manner similar to the CCOA here, alleged standing on the ground that it possessed " 'a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,' " 405 U.S. at 730. In holding that the plaintiff lacked standing, the Court stated:

> [T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

*Id.* at 734-35. Neither a protected activity nor the livelihood of CCOA is threatened by the AAP.*

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* Compare the injury alleged here (frustration of objectives) with those deemed sufficient in *NAACP* v. *Button,* 371 U.S. 415, 428 (1963) (NAACP had standing to challenge a statute that "infringes the rights of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their . . . rights."), and *Data Processing Service* v. *Camp,* 397 U.S. 150, 152 (1970) ("competition by national banks in the business of providing data services might entail some future loss of profits").

The other injuries which CCOA complains of—payment of expenses to guarantee the constitutional rights of correctional officers, Amended Complaint, pp. 13, 14—cannot confer standing because *any* association which takes an active interest in any cause would incur similar expenses.

Moreover, CCOA's allegations are insufficient to establish representational standing based upon injury to its members. An organization "can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit." *Warth* v. *Selden,* 422 U.S. 490, 516 (1975). Compare *Sierra Club* v. *Morton, supra,* 405 U.S. at 735 (no allegation of use of future resort area by members) with *United States* v. *SCRAP,* 412 U.S. 669, 687 (1973) ("action of [ICC] would directly harm [members] in their use of . . . natural resources").

There is no indication on the record that any of the CCOA's members, including Minnick or Darden, will be adversely affected or aggrieved by the AAP. It is not an appropriate function of this Court to speculate as to whether the CCOA has other members who were injured as a result of the AAP. See *Sierra Club* v. *Morton, supra,* 405 U.S. at 735 n.8 (1972). In any event, CCOA also presumably has members who have benefited from the AAP, the members who fall within the preferred classifications. Where, as here, "the damages claims are not shared by all in equal degree . . . and both the fact and extent of the injury would require individualized proof," the organization has no standing based upon alleged injury to its members, *Warth* v. *Selden,* 422 U.S. 490, 515-16 (1975). Thus, the petition for certiorari should be dismissed as improvidently granted.

## CONCLUSION

This Court should reverse the judgment of the court of appeal and direct that judgment be entered in favor of petitioners on the ground that the AAP violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, or alternatively, dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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